

unintended collateral federal review of state judgments, as has Jane in this case.

A. The Ninth Circuit's Decision is in Conflict with this Court's Decisions in *District of Columbia Court of Appeals v. Feldman* and *Rooker v. Fidelity Trust Co.*

The Ninth Circuit's decision is in conflict with the *Rooker-Feldman* doctrine, which provides that federal district courts lack subject-matter jurisdiction over actions that "attempt to obtain direct review of the [state court's judicial] decision in the lower federal courts." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 622-623 (1989); see *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). Below, the Ninth Circuit held that while this case "falls within the traditional boundaries of the *Rooker-Feldman* doctrine" (Pet. App. 10a), because Congress has granted authority to the lower federal courts to invalidate state court "actions" in violation of §§ 1911, 1912, or 1913 of ICWA, the District Court's exercise of subject matter jurisdiction in this case was proper. (Pet. App. 21a.) However, if Congress had intended such a profound effect upon the finality of state court judgments, in such a sensitive area of traditional state court jurisdiction, it would have stated this intention expressly.

Section 1914 provides:

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such

action violated any provision of sections 1911, 1912, and 1913 of this title.

25 U.S.C. § 1914. On its face, the statute creates only an exception to the rule precluding federal court interference with ongoing state proceedings. *Younger v. Harris*, 401 U.S. 37 (1971). See *Moore v. Sims*, 442 U.S. 415, 423 (1979) (*Younger* abstention appropriate in context of state child removal proceedings due to allegations of child abuse). The statute speaks in the present tense of a child who *is* the subject of an action for foster care placement or for termination of parental rights, not who *was* the subject of such an action at some time in the past, and the statute authorizes that child to bring an action to invalidate the challenged state-court proceedings. Also authorized to bring such an action is an Indian custodian from whose custody "*such child*" – i.e., a child who is *presently* the subject of a state-court action for foster care placement – was removed, and that child's tribe. There is no mention of judgments in the section; the statute does not speak in terms of retrospective invalidation.

A review of §§ 1911, 1912 and 1913, the violation of which support a petition under § 1914, reveals that these sections concern intermediate issues that arise during the course of a child custody proceeding: the assertion of adjudicatory jurisdiction (§ 1911(a)); the transfer of proceedings to tribal courts (§ 1911(b)); intervention in pending state court proceedings (§ 1911(c)); full faith and credit to tribal proceedings (§ 1911(d)); notice, appointment of counsel, and examination of documents (§ 1912(a)-(c)), and evidentiary standards in foster care and parental rights

determinations (§ 1912(e)-(f)).⁴ If § 1914 is to be understood to create a federal cause of action to interfere with state court child custody proceedings, this interference should be limited to “actions” within pending child custody proceedings.

That such a construction is more consistent with the intent of ICWA is illustrated by the circumstances presented in this case, and the troubling outcome the Ninth Circuit’s ruling would permit. In the underlying child custody proceedings, the Superior Court entered orders for foster care placement, termination of parental rights, and Jane’s adoption. By its terms, § 1914 allows review only to invalidate an “action” for foster care placements or the termination of parental rights. But on its face, § 1914 does not reach state-court *adoption* proceedings. Thus, by interpreting § 1914 to allow federal review of the Superior Court’s final judgment terminating Cross-Respondent’s parental rights, the Ninth Circuit has created the untenable circumstance under which that termination could be nullified in the ongoing District Court proceedings, while Jane’s adoption by Mr. and Mrs. D. would remain untouched. This is a result Congress could not have intended.

⁴ Section 1913 concerns the voluntary termination of parental rights, and so is not implicated in this case. It is perhaps significant to an understanding of ICWA’s legislative scheme, however, that § 1913 provides the only express authority for the termination of a final adoption. 25 U.S.C. § 1913(d). However this authority is restricted to instances of fraud, and requires the petition to be filed *in state court* within two years of the final adoption order. 25 U.S.C. § 1913(d). Although the result could be the overturning of a final state court judgment, *Rooker-Feldman* considerations are not implicated because the petition is to be filed in state court.

The conclusion that Congress intended to permit district court review of final state court judgments is premised upon an expansive interpretation of the statutory language that is unwarranted considering the significant impact on federalism that will result, and the need for finality in Indian child custody proceedings. The Ninth Circuit's decision is erroneous, and § 1914 creates no exception to the *Rooker-Feldman* doctrine.

B. The Ninth Circuit's Erroneous Interpretation of § 1914 is of National Import

The Ninth Circuit's holding that § 1914 authorizes collateral lower federal court review of final state court judgments has national implications for state courts and for Indian children who have an interest in the finality of state court judgments concerning their dependency status. Unlike the question presented in the opening petition, the question presented here is truly of national scope because the Ninth Circuit's ruling on the applicability of the *Rooker-Feldman* doctrine is not limited to PL-280 states, but will effect every court in every state in the nation. Under the Ninth Circuit's ruling, there is no way to determine when a state court decision concerning the dependency status of an Indian child will be final and binding.⁵

⁵ We note that ICWA provides no statute of limitations, or other procedural safeguards governing the application of § 1914 to invalidate state court judgments. Ordinarily, a federal court would look to an analogous state statute to determine the applicable limitations period. Here, it is difficult to imagine what state statute of limitations would apply to a collateral attack on a final state court judgment. These uncertainties lend support to the contention that § 1914 has been misconstrued by the Ninth Circuit.

CONCLUSION

For the reasons stated, the Court is requested to grant the cross-petition for writ of certiorari in the event it also grants the opening petition.

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No. 05-951

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IN THE
Supreme Court of the United States

ARTHUR MANN, *et al.*,

Cross-Petitioners,

v.

MARY DOE,

Cross-Respondent.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether 28 U.S.C. § 1331 and the Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901-1963, authorize the lower federal courts to review and invalidate final state court judgments in child custody proceedings governed by ICWA, or whether such review is barred by the *Rooker-Feldman* doctrine.

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OPINIONS BELOW

The opinion of the Court of Appeals, Pet. App. 1a-70a, is reported at 415 F.3d 1038. The District Court's opinion, Pet. App. 71a-97a, is reported at 285 F. Supp. 2d 1229.

JURISDICTION

The Court of Appeals entered its judgment on July 19, 2005. Pet. App. 1a. The Court of Appeals denied a petition for rehearing en banc on September 19, 2005. Pet. App. 98a-99a. Cross-Respondent filed a petition for a writ of certiorari on December 19, 2005. Cross-Petitioners filed a conditional cross-petition for a writ of certiorari on January 27, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of ICWA, 25 U.S.C. §§ 1901-1963, are more fully set forth in Cross-Respondent's petition for certiorari. However, the following sections of ICWA are particularly relevant to the question presented in the cross-petition:

§ 1911. Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

§ 1912. Pending court proceedings

(a) Notice; time for commencement of proceedings; additional time for preparation

In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: Provided, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) Appointment of counsel

In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of

counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.

(c) Examination of reports or other documents

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

(d) Remedial services and rehabilitative programs; preventive measures

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

(e) Foster care placement orders; evidence; determination of damage to child

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(f) Parental rights termination orders; evidence; determination of damage to child

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

§ 1913. Parental rights; voluntary termination

(a) Consent; record; certification matters; invalid consents

Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Foster care placement; withdrawal of consent

Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child

shall be returned to the parent or Indian custodian.

(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody

In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

(d) Collateral attack; vacation of decree and return of custody; limitations

After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

§ 1914. Petition to court of competent jurisdiction to invalidate action upon showing of certain violations

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may